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No. 83-1555

IN THE

Supreme Court of the United States

October Term, 1983

HOOPA VALLEY TRIBE OF INDIANS,

Petitioner,

v.

JESSIE SHORT, ET AL.,

Respondents.

RESPONSE OF CERTAIN RESPONDENTS TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT.

and to

MOTION OF TIMBER RESOURCES TRIBES AND OTHER TRIBES
FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT
OF PETITIONER HOOPA VALLEY TRIBE OF INDIANS FOR
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT.

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STATEMENT OF THE CASE

The instant case was initiated in March 1963, on behalf of certain of the Respondents (Plaintiffs in the Claims Court), seeking to appear as representatives of a class, to secure for those Indians of the Hoopa Valley Reservation who are not members of Petitioner, Hoopa Valley Tribe, aliquot shares of the profits derived from the sale of timber resources found on the unallotted land of a portion of the Reservation (the Square). These unallotted lands are held in trust for the Indians by the United States.

After an unsuccessful motion in the Court of Claims to dismiss the action, the United States requested that the complaint be amended to include as named Plaintiffs all claimants meeting the standards of the class of Indians who would be entitled to recover if the court entered judgment in their favor. The complaint was subsequently amended to set forth the names of 3,323 individual Plaintiffs.

To simplify the litigation, the cases of 26 of these Plaintiffs were chosen for trial. In its decision of October 17, 1973, 202 Ct.Cl. 870,¹ the Court of Claims found against the United States on the question of liability, and determined that 22 of the 26 sample Plaintiffs "are entitled to recover in amounts to be determined under Rule 131(c) and the claims of the others are set down for trial in accordance with the opinion." (C 150-151)

In an exhaustive review of the history of the Reservation, the rights of the Indians thereon, the Court of Claims determined that:

1. The Hoopa Valley Reservation was created pursuant to the Act of April 8, 1864, which authorized the President to set apart and locate not more than four Indian reservations in California, of such size as he found suitable, at least one of which was to be in the Northern District, for the accommodation of the Indians of California, without specification of the

¹The entire decision is set forth in Appendix C to the Hoopa Valley Tribe's Petition for Writ of Certiorari. All references to the decision are to the appropriate pages of Appendix C.

tribes to be so accommodated. The President had discretion to authorize any Indian tribes of California to reside upon such reservations as he set apart, and no Indian tribe resident upon a reservation created under the Act could obtain vested rights to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation. (C 138)

2. By Presidential Order of June 23, 1876, the Hoopa Valley Reservation was established as one of the Indian reservations authorized to be set apart in California by the Act of April 8, 1864. The area included in the Reservation, pursuant to the Presidential Order, included the land (the Square) upon which exist the timber reserves involved in the instant case. (C 139)

3. By further Presidential Order on October 16, 1891, the boundaries of the Reservation were extended to include additional territory (the Addition) upon which resided the ancestors of most of the Plaintiffs. The court held that "the plain and natural effect of the order was to create an enlarged reservation in which the Indians of the original reservation and the Indians of the added tracts would have equal rights in common." (C 140)

4. In 1950, certain of the Indians on the original portion of the Reservation organized as the Hoopa Valley Tribe. Membership in the tribe was so defined as to exclude from membership a majority of the Indians of the Reservation, including Respondents. (C 124-131)

5. Until 1955, revenues derived from all parts of the Hoopa Valley Reservation were deposited in a single United States Treasury Account. (C 134) Commencing in 1955, however, revenues derived from the sale of timber on the

Square portion of the Reservation were deposited in a separate account and payments of said revenue were made by the United States exclusively to the Hoopa Valley Tribe and its members. (C 135-136)

6. The court held that the United States "acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to income from the unallotted trust status lands of the Square. Such of the Plaintiffs as are found herein to be Indians of the Reservation will become entitled to share in the income from the entire Reservation, including the Square, equally with all othr such Indians including Indians of the Square." (C 144)

7. Twenty-two sample Plaintiffs were determined to be Indians of the Reservation entitled to recover a money judgment from the United States, the amount of which was to be determined under Court of Claims Rule 131(c), after determination of the entitlements of the remaining Plaintiffs. (C 144-151)

In response to the 1973 decision of the Court of Claims, both Petitioner and the United States filed Petitions for Writ of Certiorari in this court. The Petitions were denied, 416 U.S. 961, and rehearing was also denied, 417 U.S. 959.

Thereafter, on April 23, 1976, the Court of Claims permitted the intervention of an additional 515 Plaintiffs and ordered that "to the extent that this action has been treated as a class action, it is ordered that the class is hereby closed. . . ." (Order of April 23, 1976, 209 Ct.Cl. 776.)

Subsequent to the Court of Claims' 1973 determination of the Government's liability, a complex procedure was established by the trial judge, in consultation with the parties,

through which the individual entitlement claims of the various Plaintiffs could be advanced and/or challenged. This procedure included the preparation of a detailed declaration questionnaire by each individual Plaintiff, describing his or her ancestry, Indian blood degree, and association with the Hoopa Valley Reservation. Petitioner and the United States, in turn, prepared detailed responses to each of these declaration questionnaires; and Plaintiffs' counsel then prepared an individual reply to each of the joint responses by Petitioner and the United States.

Following this process, a series of motions and cross-motions for summary judgment were offered in the Court of Claims with the result that the entitlement of an additional 120 Plaintiffs was conceded, and summary judgment for said Plaintiffs was granted in orders dated December 3, 1976, February 25, 1977, and April 27, 1978. Motions for summary judgment approving the claims of the remaining Plaintiffs, and cross-motions by Petitioner and the United States to deny those claims, were fully briefed before the trial judge in 1977.

On May 23, 1979, the United States made a motion to substitute a "Yurok Tribe" for the individual named Plaintiffs, and on November 16, 1979, Petitioner was granted leave to file a motion to dismiss the case on the theory that the formulation of entitlement standards by the court involved the determination of a non-justifiable political question.

On September 23, 1981, the Court of Claims upheld the recommended decision of the trial judge to deny both the motion of the United States and the motion of Petitioner.

(B 39)² The court held that all of the issues raised by the motions had been repeatedly rejected during the course of the litigation. (B 31 and 35)

Noting that "this suite was begun in 1963 and, except for cases transferred to us from the Indians Claims Commission, it is the oldest case on our docket," (B 36) the Court of Claims ordered the entitlement proceedings expedited, and remanded the matter to the trial judge "to issue by April 1, 1982, a recommended decision determining, under standards he will formulate in accordance with this opinion, which of the plaintiffs whose cases are ready for disposition are Indians of the Reservation." (B 39)

As a matter of guidance to the trial judge in determining entitlement standards, the court said:

"The timber revenues that the Secretary distributed to individual Hoopa Indians beginning in 1955 were paid to those persons whom the Hoopa Business Council had determined to be members of the Tribe. . . . In determining the membership of the Hoopa Tribe (to whom the Secretary made the payments), the Hoopa Business Council used a detailed and carefully drawn set of standards. We described and explained these standards in our findings in our 1973 decisions. Fdgs. 137-45, 148, 152(c), 155-56, 202 Ct.Cl. at 959-67. The Secretary approved both the Hoopa Constitution (which specified the standards for membership in the Hoopa Valley Tribe,

²The entire decision is set forth in Appendix B to the Hoopa Valley Tribe's Petition for Writ of Certiorari. All references to the decision are to the appropriate pages of Appendix B.

fdg. 145, 202 Ct.Cl. at 962) and two schedules which listed most of the Indians who had been determined to be members of the Tribe. Fdg. 153, 202 Ct.Cl. at 964. . . .

"The Hoopa Tribe standards . . . provide an appropriate guideline and basis for determining which of the plaintiffs are entitled to share in the timber payments because they are Indians of the Reservation. Those are the standards the trial judge basically should apply in deciding the question." (B 37, 38)

Again, Petitioner and the United States filed Petitions for Writ of Certiorari in this court, and, again, the Petitions were denied. 455 U.S. 1034.

On March 31, 1982, the trial judge issued an opinion in which he established standards, adapted from the enrollment standards of Petitioner, to be used in qualifying the various Plaintiffs as Indians of the Hoopa Valley Reservation. By application of these standards, the trial judge determined that an additional 2,161 Plaintiffs were entitled to recover in these proceedings. (Appendix I to the Petition) Pursuant to an order of the Court of Appeals for the Federal Circuit to which the case was transferred on October 1, 1982, under Section 403 of the Federal Courts Improvement Act of 1982, (A 2)³ the Court of Appeals allowed the United States and Petitioner to file new motions to dismiss for an alleged lack of jurisdiction. (A 2) The Court of Appeals then denied the motions to dis-

³Appendix A to the Hoopa Valley Tribe's Petition for Writ of Certiorari is the entire October 6, 1983 decision of the Court of Appeals for the Federal Circuit. All references to the decision are to the appropriate pages of Appendix A.

miss for an alleged lack of jurisdiction. (A 2) The Court of Appeals then denied the motions to dismiss (A 9), and sustained the entitlement decision of the trial judge without change, noting that "all parties' objections to the trial judge's standards and to his conclusions of law are disapproved." (A 20)

On March 3, 1984, Petitioner filed its Petition for Writ of Certiorari.

In April 1984, the Timber Resources Tribes and Other Tribes filed a motion for leave to file a brief as amici curiae in support of the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

1. The instant case, which is now 21 years old, will never be concluded if Petitioner is permitted to again and again relitigate questions already decided by the courts. Petitions for writ of certiorari by the same Petitioner were denied in 1974 and 1981.

In its rejected 1981 petition, Petitioner presented an argument with regard to interpretation of 25 U.S.C. Section 407, the timber sales proceeds statute. Petitioner's interpretation of the statute is not supported by either the language of the Act, or its history.

Petitioner would deny a recovery to Respondents by defining the word "tribe" to include only formally organized entities such as itself; but this proposed definition does not comport with the history of the Indians of California, Congressional definitions of Indian tribes, or the decisions of the courts.

2. The Court of Appeals has determined that criteria comparable to the enrollment standards of the Hoopa Valley Tribe should be applied to all of the Indians of the Hoopa Valley Reservation for purposes of determining entitlement

to recover in this proceeding. It stretches credibility too far for Petitioner to argue that these enrollment standards are permissible when applied to the Indians who are members of the Hoopa Valley Tribe, but constitute an impermissible racial classification when applied to other Indians of the Reservation.

3. Nothing in the decision of the Court of Appeals affronts the decision of this court in *United States v. Mitchell*, ___ U.S. ___, 103 Sup.Ct. 2961 (1983) (hereafter *Mitchell II*). Nor does the decision either "erect a serious hindrance to effective administration of the Indian timber harvest statute" (Petition, p. 10), or set "a dangerous and disruptive precedent for other areas of the law where tribal rights are asserted." (Petition, p. 18)

These arguments presented by Petitioner are wholly specious and constitute a cloak behind which Petitioner seeks to continue the misapplication of the proceeds of the reservation's trust assets for the benefit of the Hoopa Valley Tribe only, at the expense of the majority of the Indians of the Reservation.

ARGUMENT

I

IN ITS PETITION, THE HOOPA VALLEY TRIBE MAKES THE SAME ARGUMENT WITH REGARD TO 25 U.S.C. SECTION 407 THAT IT MADE IN ITS REJECTED 1981 PETITION FOR WRIT OF CERTIORARI. NOTHING HAS OCCURRED SINCE 1981 TO CAUSE THIS COURT TO REVERSE ITS PRIOR REFUSAL TO GRANT THE PETITION.

Petitioner argues in 1983, as it argued in 1981, that 25 U.S.C. Section 407, the statute which provides for the distribution of proceeds from reservation timber sales has applicability only to tribes, and not to unorganized Indians of the Reservation. This argument has been rejected by the trial court, the appellate court, and by this Court in its denial of Petitioner's 1981 Petition for Writ of Certiorari.

Petitioner now falsely argues that it was deprived of due process of law by being denied an opportunity to present evidence and argument as to its interpretation of 25 U.S.C. Section 407. Petitioner had full opportunity to present its argument in the court below, and did so.

The parties' respective interpretations of 25 U.S.C. Section 407 were fully briefed and argued before the Court of Appeals in 1983, both in connection with Petitioner's motion to dismiss the instant case, and in the supplemental memoranda filed by the parties with regard to the decision of the United States Supreme Court in *Mitchell II*, *supra*.

Contrary to Petitioner's contention, the Court of Appeals did not concede any jurisdictional defect in its prior decisions in the instant case, but found Section 407 an additional basis upon which the liability of the Government to Respondents could be sustained. The court said:

"Both movants (the Government and the Hoopa Valley Tribe) . . . make much of the fact that the Act of April 8, 1864, 13 Stat. 39 [App. 55-56], which authorize the establishment of the Hoopa Valley Reservation and on which the Court of Claims primarily based its determination that qualified plaintiffs were entitled to share in the disputed monies (although they were not members of the Hoopa Valley Tribe), did not contain any authorization to the Government to sell or manage timber or empower the Government to distribute the proceeds. That may be true but it is irrelevant to the jurisdictional point before us. When this action was begun in 1963, the timber management legislation (mainly 25 U.S.C. §§ 405-407) and the regulations thereunder, which do sustain jurisdiction, had long been on the books and covered all the monies claimed in the suit. . . . The function of the 1864 statute is to help show that the Government had a fiduciary relationship toward qualified Plaintiffs with respect to the Hoopa Valley Reservation and also to show that the Secretary's action in excluding all but members of the Hoopa Valley Tribe from the distribution of the monies was unlawful."
(A 6)

Petitioner misconstrues Section 407, both as it was originally written in 1910 and as it was amended in 1964.

From 1910 until enactment of the 1964 amendment, Section 407 directed that timber on unallotted reservation lands may be sold and the proceeds "used for the benefit of the Indians of the reservation in such manner as (the Secretary of the Interior) may direct." In 1964, the statute was amended to substitute the term "Indians who are members of the tribe or

tribes concerned" for the term "Indians of the reservation".

The legislative history of this amendment to 25 U.S.C. Section 407 clearly shows that the amendment was not designed to limit distribution of timber proceeds to "organized tribes" as opposed to other Indians of the reservation. Rather, the term "Indians of the reservation" had been interpreted to permit distribution only to Indians resident on the reservation. The term "members of the tribe or tribes concerned" was substituted in order to allow distribution of revenues derived from timber sales "for the benefit of tribal members rather than, as under present law, only those who live on the reservation concerned." (Legislative History, Appendix G to the Petition, pp. 173 and 175) The purpose of the amendment was to enlarge participation in the distributions, not contract such participation.

Neither the pre-1964 nor post-1964 versions of the statute can be read to justify discriminatory distribution of revenues by the United States to the members of a single tribe at the expense of other equally entitled Indians of the Reservation.

The Hoopa Valley Reservation was created for the benefit of all California Indians who settled there, without regard to membership in officially organized tribes. Petitioner did not organize until 1950, 40 years after 25 U.S.C. Section 407 was adopted. Under Petitioner's interpretation of the statute, no Indian of the Hoopa Valley Reservation could benefit from the 1910 Act until the Hoopa Valley Tribe organized in 1950. Such a result cannot be harmonized with the clear and unambiguous language used by Congress when it enacted the statute.

Petitioner presents, as if determinative, certain testimony at closed Congressional Committee and Subcommittee hear-

ings on the 1964 amendments to 25 U.S.C. Section 407. (Petitioner's Appendix G, 178-193) The testimony upon which Petitioner relies is primarily that of Graham Holmes, a witness at the hearings on behalf of the Bureau of Indian Affairs. In addition to Mr. Holmes' testimony at the 1964 hearings, Petitioner presents a recent affidavit of Mr. Holmes purporting to: (1) construe the unambiguous terms of the 1910 Act, and (2) establish Congress' intent with regard to the 1964 amendments.

Unpublished material which was never available to the legislators voting on an Act is worthless to establish legislative intent. Even if it had been published, Mr. Holmes' personal views cannot alter the perfectly clear language of the 1910 Act, or be considered to determine what Congress intended with regard to the 1964 amendments.

The 1910 version of 25 U.S.C. Section 407 provides in relevant part:

" . . . the proceeds from such sales shall be used for the benefit of Indians of the reservation. . . . "

This language could not be clearer. All Indians of the reservation are entitled to share in the proceeds from timber sales.

When a statute is clear on its face, it is not necessary to resort to legislative history. *U.S. v. Oregon*, 366 U.S. 643, 648 (1961); *National Home v. Wood*, 229 U.S. 211, 216 (1936). Rather, the unambiguous wording of the statute shall be given its plain and commonly understood meaning. *Selman v. United States*, 498 F.2d 1354, 1356 (Ct.Cl. 1974).

Even if the statute was ambiguous, however, Mr. Holmes' personal views cannot be used to construe the terms of either

the 1910 Act or its 1964 amendments. Mr. Holmes is not, and has never been, a member of Congress. His testimony in 1964 was presented 54 years after the 1910 Act was passed. His recent affidavit was prepared 73 years after the Act was passed.

Expressions of legislators in an attempt to establish the intent of Congress in an earlier act are not accepted as authority, and even statements made by Congressmen during the debates prior to passage of a bill are not a safe guide to interpretation of a statute. *United States v. Mineworkers*, 330 U.S. 258, 276-277, 284 (1947).

It has been specifically held that the opinions of witnesses at congressional hearings are of dubious value in interpreting a statute. *March v. U.S.*, 506 F.2d 1306 (CA DC 1974). Congress has not delegated to organizations or individuals appearing before its committees the authority to construe a statute. *U.S. v. Fairfield Gloves*, 558 F.2d 1023 (Ct. Cust. & Pat. App. 1977). The Supreme Court has stated that courts should be wary of testimony before a committee hearing except for testimony by the legislators who were the sponsors of the proposed laws, and concerning a precise analysis of the statutory phrases. *S & E Contractors, Inc. v. U.S.*, 406 U.S. 1, 13 (1971). The views of witnesses are not necessarily the same as those of the legislators voting on the bill. *Harry Fox Agency, Inc. v. Mills Music*, 543 F.Supp. 844, 864 (DC NY 1982).

II

PETITIONER'S ENROLLMENT STANDARDS, AS APPLIED TO RESPONDENTS FOR PURPOSES OF DETERMINING ENTITLEMENT TO SHARE IN REVENUES DERIVED FROM THE RESERVATION'S UNALLOTTED TIMBER RESOURCES, DO NOT CONSTITUTE AN IMPERMISSIBLE RACIAL CLASSIFICATION.

Petitioner argues that Indians may be defined only in terms of organized tribes. This argument flies in the face of: (a) the contrary definitions of "Indians" which have been enacted by Congress; (b) the decisions of the courts which recognize the rights of both individual Indians and members of organized tribes; and (c) the particular history and development of the Indian people of the State of California and of the Hoopa Valley Reservation.

The narrow tribal definition of Indians advanced by Petitioner would shear from a majority of the Indians of the Hoopa Valley Reservation any recognition of their native American heritage.

Congress has fashioned many different definitions of the term Indian to meet the specific requirements of differing circumstances. 25 U.S.C. Section 479, part of the Indian Reorganization Act of 1934, defines Indians for purposes of the Act, as: (a) all persons of Indian descent who are members of any recognized tribe now under federal jurisdiction; (b) all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation; and (c) *all other persons of one-half or more Indian blood.*

25 U.S.C. Section 480 defines an Indian, for purposes of eligibility for certain loan funds, as *an individual of no less than one-quarter degree of Indian blood.*

25 U.S.C. Section 482 provides for revolving fund loans to "tribes, bands, groups, and *individual Indians* not otherwise eligible for loans" under certain acts. (Emphasis added) The statute further provides that "no portion of these funds shall be loaned to Indians of less than one-quarter Indian blood."

25 U.S.C. Section 2201 defines Indian as "any person who is a member of a tribe or *any person who is recognized as an Indian by the Secretary of the Interior.*" (Emphasis added)

The Indians of California are defined in 25 U.S.C. Sections 651 and 659 by reference only to ancestry, and without reference to either tribal affiliation or blood degree, as "all Indians who were residing in the State of California on June 1, 1852, *and their descendants now living in said state.*" (Emphasis added)

During the years prior to 1950, when there were no organized tribes on the Hoopa Valley Reservation, Congress repeatedly made appropriations for the Indians of the Reservation in substantially the following language:

"For support and civilization of Indians under the jurisdiction of the following agencies, to be paid from the funds held by the United States in trust for the respective tribes, not to exceed the sums specified in each case, to wit: . . . Hoopa Valley (specified amount)." 42 Stat. 567 (1922); see also 41 Stat. 1247 (1921); 43 Stat. 411 (1924); 43 Stat. 1161 (1925); 50 Stat. 586 (1937).

In each of these statutes, Congress used the term tribe to refer to all Indians of the Hoopa Valley Reservation in spite of the fact that there were no officially organized tribes on the Reservation until 1950.

What these enactments show is that the various methods of defining an Indian have been established to meet the requirements of specific circumstances. The statutes recognize the rights of individual Indians, as well as members of tribes, and even the word "tribe" is used with different meanings in different contexts.

Unlike some other parts of the country, in California, the concept of Indian tribal organization had little historical meaning. In *The Indians of California v. The United States*, 98 Ct.Cl. 583, 591 (1943), the court noted:

"The Indians of California consist of wandering bands, tribes and small groups who had been roving over the same territory during the period under the Spanish and Mexican ownership, before the Treaty between Mexico and the United States whereby California was acquired by the United States. They had no separate reservations and occupied and owned no permanent sections of land. They and their forebears had roved over this country for centuries."

In *Clyde F. Thompson v. The United States*, 122 Ct.Cl. 348, 356-357, 358-359 (1952), the court described the subsequent devastating impact upon the California Indian community of the "great influx of white people that occurred after 1848." The court concluded that:

". . . the various bands and groups of Indians in that state have not existed as distinct and recognizable tribes or bands of Indians as they had lived prior to 1848. . . ."

The Court of Claims, in its 1973 decision in the instant case, quoted the Superintendent of the Hoopa Indian Agency in 1929 as stating that:

"They (the Indians of the Hoopa Valley Reservation) have lost tribal affiliation to such an extent that very few of them know what tribe they belong to, and if they name a tribe, it is not a tribe, but a band of Indians named after some local name of a place where they once resided." (C 72)

While the United States has recognized the Hoopa Valley Tribe, and approved its membership standards (C 128-129), the court has also held that the United States "acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands on the Square." (C 144)

In order to provide equal treatment of all Indians of the Reservation, the Court of Claims concluded that:

"... the standards used to determine the membership of the Hoopa Valley Tribe also provide an appropriate basis for determining which of the (Respondents) are Indians of the Reservation. The timber revenue payments were made to those Hoopas who, on the basis of those standards, had been determined to be Indians of the Reservation as the Secretary then viewed that area, i.e., solely the Square. We held in 1973 that 'Indians of the Reservation' were not limited to those of the Square, but also included those of the Addition. The basis that originally were used to determine the Indians of that portion of the Reservation, and which the Secretary of the Interior used in his decision on how to distribute the timber profits for the benefit of the Indians of the Reser-

vation, are no less appropriate to determine the additional persons whom we have held are also Indians of the Reservation." (B 37)

In the instant case, the court has acted to achieve equality of treatment, not to impose on Respondents an impermissible racial classification. It is the height of hypocrisy for the Hoopa Valley Tribe to argue that its enrollment standards are a suitable basis for determining the right to timber revenue distributions for some Indians of the Reservation, while the same standards constitute an impermissible racial classification when applied to other Indians of the Reservation.⁴

The "racial classification" argument of the Hoopa Valley Tribe is patently without merit.

III

THE COURT OF APPEALS HAS CORRECTLY HELD THAT THERE IS :TUCKER ACT JURISDICTION IN THE INSTANT CASE, FOUNDED UPON STATUTES WHICH CREATE SUBSTANTIVE RIGHTS TO MONEY DAMAGES.

Prior to the 1983 Supreme Court decision in *Mitchell II*, *supra*, Petitioner argued that there had been no waiver of sovereign immunity in the instant case. Having lost that battle, Petitioner now retreats to the equally untenable argument that none of the statutes upon which Respondents rely, and upon which the Court of Appeals based its decision, can

⁴Petitioner urges this court to grant certiorari on the theory that Respondents have no rights as Indians because they are not members of an organized tribe. (Petition, p. 17) At the same time, Petitioner argues that Respondents comprise the "Yurok Tribe" as a "federally-recognized tribe . . . not formally organized and its membership is undefined. 48 F.Reg. 56865 (December 23, 1983)." (Petition, p. 3, fn. 2)

be fairly interpreted as mandating compensation for the damages sustained. This argument, too, is without merit.

A. *The 1864 Act Establishing the Hoopa Valley Reservation.*

In *Mitchell II*, the court described "the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people.' This principle has long dominated the Government's dealings with Indians." (citations omitted) (at p. 2972) The court then added:

"This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and *an Indian* or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." (at p. 2973) (Emphasis added)

Under the Act of 1864, which established the Hoopa Valley Reservation, the United States holds the Reservation land and resources in trust for the Indians of the Reservation. In 1973, the Court of Claims found that the United States had violated its trust responsibility to Respondents by conveying to Petitioner the portion of the revenue derived from the unallotted trust resources of the Reservation which should have

been conveyed to Respondents. This breach of trust is actionable.⁵

The sovereign immunity of the United States has been waived pursuant to 28 U.S.C. Section 1491. As the Court of Claims said in *Mitchell v. United States*, 664 F.2d 265, 268 (1981), statutes mandating compensation are not only "those which expressly authorize the payment of the money sought (and proved). As we understand them, neither *Testan* (*United States v. Testan*, 424 U.S. 392, 400 [1976]) nor *Mitchell*, *supra*, excludes all non-express indications of the right to compensation, no matter how strong or compelling they may be. . . . [T]he Supreme Court's decisions do not say that the substantive right to money must always be explicitly stated in the substantive legislation itself."

Certainly, by implication, the 1864 Act conveys to Respondents a right to sue.

B. 25 U.S.C. Section 407.

In *Mitchell II*, *supra*, the Supreme Court dealt directly with 25 U.S.C. Section 407 and the other sections of law pertaining to sale and regulation by the United States of the timber resources of Indian reservations. The court found:

" . . . the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship

⁵The misapplication of the funds to which Respondents are entitled also brings the case within the jurisdiction described in *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (1967), as a situation in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum.

and define the contours of the United States fiduciary responsibilities. . . .

"Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well-established that the trustee is accountable in damages for breaches of the trust." (at pp. 2972-2973) (Emphasis added)

C. 31 U.S.C. 1321

This section establishes the trust relationship between the United States and the Indian beneficiaries with regard to proceeds of labor accounts.

The principal source of the funds flowing to the Hoopa Valley Reservation's proceeds of labor account has been sale of the very timber on the unallotted lands of the Reservation which is the subject of the instant suit.

Each of these described statutes is applicable to the instant case, and each provides a basis for suit in conjunction with 28 U.S.C. Section 1491, the Tucker Act.

IV

THE DECISION OF THE COURT OF APPEALS WILL HAVE NO ADVERSE IMPACT ON THE FEDERAL GOVERNMENT'S ADMINISTRATION OF THE INDIAN TIMBER HARVEST STATUTE, OR THE LAWFUL OPERATIONS OF ANY INDIAN TRIBE IN THE UNITED STATES.

Petitioner argues that:

“Absent review by this Court, the lower court decision will erect a serious hindrance to effective administration of the Indian timber harvest statute.” (Petition, p. 10)

Petitioner also urges the Court to consider “the impact on the tribes themselves of the Section 407 interpretation.” (Petition, p. 11)

It is significant that the United States, which administers the timber program, has filed no petition for writ of certiorari in the current proceeding. The Government certainly would have done so had it shared the concern expressed by Petitioner.

The narrow scope of the Court of Appeals decision is described by the court itself as follows:

“At the close of our opinion we again stress — what the Court of Claims several times emphasized and we have interlaced *supra* — that all we are deciding are the standards to be applied in determining those plaintiffs who should share as individuals in the monies from the Hoopa Valley Reservation unlawfully withheld by the United States from them (from 1957 onward). This is solely a suit against the United States for monies, and everything we decide in that connection alone; neither

the Claims Court nor this court is issuing a general declaratory judgment. We are not deciding standards for membership in any tribe, band, or Indian group, nor are we ruling that Hoopa membership standards should or must control membership in a Yurok Tribe or any other entity that may be organized on the reservation." (A 20)

Thus, the court has made clear that no other tribe or reservation will be affected by the Court of Appeals decision; and there has been no showing that conditions exist on any other reservation comparable to those prevailing on the Hoopa Valley Reservation.

In the more than ten years since the 1973 decision of the Court of Claims (Appendix C), no comparable case has been initiated with regard to any reservation. If such a case should ever be initiated, it would have to be decided on the basis of the statutes, administrative orders, and historical treatment peculiar to the affected reservation.

Petitioner's claim of widespread danger from the decisions in this case is merely another baseless argument advanced by Petitioner in an effort to secure judicial approval of the Government's past policy of taking money belonging to Respondents and misapplying those proceeds to Petitioner's benefit.

V

NO NECESSITY HAS BEEN DEMONSTRATED FOR THE BRIEFS OF AMICI CURIAE AND THE MOTION FOR LEAVE TO FILE SUCH A BRIEF SHOULD BE DENIED.

Certain Timber Resource Tribes and Other Tribes have made a motion for leave to file a brief as amici curiae in support of Petitioner. In its motion, these Tribes admit that

consent for filing of an amicus brief was denied by Respondents, and that Rule 36.1 of this court provides that:

“A motion for leave to file such a brief when consent has been refused is not favored.”

The Amici argue that many statutes, including 25 U.S.C. Section 407 “use the terms ‘tribe’ and ‘Indian’ without definition.” (Motion, p. 2) Amici then ask this Court to perform the legislative function of writing into these statutes a definition of tribe which would abrogate all rights of individual Indians, and of all groups or bands of Indians not operating under an arbitrary form of political organization. Such a definition would, of course, be totally contrary to the history of the Indians of California, and particularly those of the Hoopa Valley Reservation. Great havoc would be wrought if the Court were to attempt to define an Indian tribe in accord with Amici’s admonition “that to constitute an Indian tribe in a legal sense, an entity must, among other things, be recognized by the United States as a distinct political entity possessing powers of self-government and eligibility for special programs and services.” (Motion, p. 3) The instant case is not a proper launching pad for such a far-reaching and mischievous innovation.

The Amici argue that:

“Federal courts have consistently held that, absent allotment, reservation property is tribal property in which individual Indians have no separate interest.” (Motion, p. 7)

It is correct to state that the courts have defined the concept of Indian property as communal. *Journeycake v. Cherokee Nation and the United States*, 28 Ct.Cl. 281, 302 (1893); and

that all tribal lands were held by the Indians as communal property. *Prairie Band of Potawatomi Indians v. United States*, 143 Ct.Cl. 131, 143 (1958).

It does not follow, however, that because all tribal lands are communal, all communal lands are also tribal. Reservations may be set apart for Indian tribes, individual Indians, or both. See for example *Shoshone Tribe v. United States*, 299 U.S. 476, 485-486 (1937), where the court said:

“The United States agreed that the territory described in the treaty now generally known as the Windriver Reservation, would be ‘set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them.’ ”
(Emphasis added)

When a recovery is strictly tribal, only members of the tribe may participate in the judgment. *Eastern Band of Cherokee Indians v. United States*, 177 U.S. 288, 308-312 (1885); *Eastern Cherokees v. United States*, 45 Ct.Cl. 229, 234-235 (1910).

On the other hand, where a judgment does not belong exclusively to a tribe, entitled individuals outside its ranks may participate in the recovery. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 82 (fn. 14) (1977).

In the instant case, the Court of Claims found that the Hoopa Valley Reservation was established by statute and executive order for the accommodation of the Indians of California (C 55) and specifically described the unallotted lands of the Hoopa Valley Reservation as “communal lands”. (C 52)

There is no reason in logic or law why communal lands of an Indian reservation may not be held in the traditional manner by all of the Indians of a reservation, as opposed to one or more formally organized tribal entities. And, the bestowal on each communal owner of an individual share of a money judgment does not conflict with the continued status of reservation lands as communal.

A monetary judgment award to an individual Respondent in this proceeding will accomplish no more than to vest the right of the successful Respondent in his *distributed share* of the judgment. *Sizemore v. Brady*, 235 U.S. 441 (1914). The Court of Claims' intent not to interfere with the communal ownership of the land is illustrated by the fact that the court denied a motion for intervention in the suit by a number of descendants of the present Respondents, whose participation would have been automatic if Respondents' rights in the land were descendable.

The interest alleged by Amici is remote from the realities of the instant case, and the briefing by Amici would enlarge the scope of the proceedings far beyond anything necessary to dispose of the issues presented by the decision of the Court of Appeals. To the extent that Amici have any genuine interest in the instant case, that interest is protected by Petitioner, whom Amici support.

Even if the Petition for Writ of Certiorari is granted, no benefit would accrue to the Court by the introduction of Amici's speculative concerns on issues not actually presented by the decision of the Court of Appeals.

CONCLUSION

For the reasons set forth above, and each of them, it is respectfully requested that the Petition for Writ of Certiorari be denied.

These proceedings have already been unreasonably protracted, and it is time to allow the case to go to final judgment in the Claims Court.

Respondents concur with the Court of Appeals which said in its decision:

“We note, finally, our fervent hope that this very old case will speedily be concluded in the light of the trial court’s judgment now affirmed in its entirety by this court.” (A 21)

Dated: May 18, 1984

Respectfully submitted,

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